(13)

No. 03-636

SEP 10 2004

IN THE

Supreme Court of the United States

GARRISON S. JOHNSON,

Petitioner,

v.

CALIFORNIA, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF

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INTRODUCTION

Respondents urge this Court to uphold a policy of routine racial segregation that has persisted in the California prison system longer than anyone can remember. This Court should decline that invitation and, instead, reaffirm the right of all individuals to be free from racial discrimination absent "particularized circumstances" that demand extraordinary measures to preserve security.

Respondents and their amici attempt to reinvent the record below to defend California's racial segregation policy. Petitioner Garrison Johnson ("Johnson") does not dispute that violence occurs in prisons, that some prisoners act violently, or that the violence in prisons occurs both between persons of different skin color or ethnicity and between persons of the same skin color or ethnicity. But Respondents submitted no evidence whatsoever that the behavior of incoming and transferred prisoners is preordained by race. Nor did Respondents submit any evidence that any group of prisoners – much less every group of prisoners – suffers disproportionate violence from members of *different* "ethnic race[s]" than they do from members of their "same ethnic race[s]" (Resp. Opp. Cert. 2), or that racial segregation of all incoming and transferred inmates is necessary to reduce such violence. Absent any evidence that interracial violence is disproportionately greater than *intra*racial violence (for every "ethnic race"), that interracial violence necessarily arises from racial hostility, and that racial segregation in initial cell assignments is necessary for prison security and discipline, Respondents' policy cannot be sustained.

Moreover, not a single jurisdiction, including the eight states that have filed an amicus brief in Respondents' support, find a policy like California's necessary. Despite having maintained its segregation policy for more than a quarter of a century, and, as Respondents concede, perhaps for as long as "a hundred years," California has not adduced a single study, statistic, or fact that demonstrates or even suggests that the policy is other

than what it appears to be – a reflexive and never-considered response, rooted in racial stereotypes.

On the record in this case, the California Department of Corrections' ("CDC") "justification" for its segregation policy is precisely the justification once offered to support segregation in the United States military, in schools, and in parks – that "we know" there will be violence, or riots, or worse. The Equal Protection Clause, and *Lee v. Washington*, 390 U.S. 333 (1968), require far more.

I. This Case Squarely Challenges California's Policy Of Segregating All Male Inmates By Race In Two-Man Cells Upon Arrival And Transfer

Petitioner never waived his challenge to segregation of two man cells upon each institutional transfer of inmates. In fact, he firmly stated it. Respondents admit that more than 350,000 inmates were segregated by race in reception centers in 2003 alone. Resp. Br. 6.[1] Of those, fewer than 15 percent were newly admitted inmates regarding whom the CDC claims to have "only limited information." *Id.*[2] "[A]ccording to the CDC, the chances of an inmate [whether newly imprisoned or being transferred] being assigned a cell mate of another race is '[p]retty close' to zero percent." Pet. App. 3a; *see also* J.A. 207a (CDC Form

1. The entire population of male inmates at the CDC institutions and camps as of December 31, 2003, was 144,548. California Department of Corrections, *Weekly Report of Population as of Midnight December 31, 2003, available at* http://www.corr.ca.gov/OffenderInfoServices/Reports/WeeklyWed/TPOP1A/TPOP1Ad031231.pdf.

2. As discussed below, Section III.B. *infra*, the CDC's claim that they have "only limited information" regarding newly admitted inmates is inconsistent with the requirement of the California Penal Code that a presentence report be prepared for every such inmate for use "by the Department of Corrections in deciding upon the type of facility and program in which to place a defendant. . . ." Cal. Rules of Court, Criminal Cases, rule 4.411(d) (West 2004).

136).[3] That policy was applied to Petitioner on his initial imprisonment and again upon each transfer. Respondents cannot avoid their obligation to justify their policy with respect to the 85 percent of prisoners racially segregated in reception centers for whom they already have both the results of the initial classification study (J.A. 303a-305a) and subsequent CDC records.

Respondents' argument that Johnson has "'explicitly disavowed' any challenge to the transfer policy" (at 10 n.7, 12 n.9, 14) is belied by both the Ninth Circuit's opinion *and* the

3. Nor does the record support Respondents' argument that the CDC looks to a variety of factors in making housing placements within the reception centers. Resp. Br. 8. To the contrary,

> when an inmate arrives at a CDC facility, if not required to be single-celled or able to be housed in a dormitory, he is generally initially, housed double-celled with an inmate of his own ethnic race. . . . After the orientation period (which typically takes around 60 days), the inmate is either retained at the institution as his permanent housing or is transferred to the institution where the classification representatives determine he would be most suited. If he is to be housed at another institution, then the inmate will go through a housing screening process. In fact, every time an inmate is transferred, his housing and status requirements are evaluated prior to cell placement.

J.A. 305a (Declaration of Steven Cambra, former acting Director of the CDC); *see also* J.A. 309a (Declaration of Associate Warden L. Schulteis) ("If the inmate will be housed in a double-cell, the initial housing is done by generally housing an inmate with another inmate of his same ethnic race."). Respondents' statement (at 9) that "reception center inmates may cell with inmates of other races, upon request, if the inmates provide information that they are compatible" is not supported by the record, which reflects no more than that one of the CDC administrators could recall only a single occasion where a Hispanic inmate had initially been housed in the reception center with another Hispanic inmate and was at some point in time allowed to house with a black inmate because he informed the CDC that he had been raised with Crips. J.A. 183a-184a.

oral argument it expressly relied on.[4] The Ninth Circuit's opinion noted that:

> The parties . . . no longer contend that the *aftermath* of the 60-day policy is relevant; Johnson's counsel at oral argument explicitly disavowed any challenge to the *continuing effects of the CDC's housing policy and limited the challenge only to the 60-day policy itself.* Thus, the only question before this court is whether the CDC's use of race to make the temporary 60-day housing decision violates the Equal Protection Clause.

Pet. App. 6a n.2 (emphasis added). The "60-day policy" identified in the court's footnote is the *policy applied at admission and again whenever an inmate is transferred. See, e.g.*, Pet. App. 4a-5a ("If the inmate is transferred, he again goes through the initial housing screening process."). At oral argument before the Ninth Circuit, Johnson's counsel made clear that Petitioner was challenging the 60-day policy as applied on admission *and* upon transfer:

> THE COURT: . . . But you are not arguing that there is a permanent segregation, that after 60 days, no matter what, they would still be segregated into two-person cells, are you?
>
> MS. FORSHEIT: After 60 days, after the classification process, they are evaluated on a number of criteria, including psychological evaluation, custody level; and at that point they try to place the inmate with someone with whom they believe they are compatible. And the inmate may also request placement with a particular inmate.

4. Not only was the challenge to the transfer policy not waived below, but it was plainly raised in the Petition for Writ of Certiorari (at 2, 3, and 4). Respondents never contended in their brief in Opposition that the issue was not squarely presented and explicitly acknowledged that the policy applies to transferred inmates. Resp. Opp. Cert. 1-2.

> However, at the –
>
> THE COURT: But you are not arguing racial discrimination after the 60-day classification.
>
> MS. FORSHEIT: That's correct.
>
> THE COURT: All right.
>
> MS. FORSHEIT: The initial 60-day –
>
> THE COURT: Okay. I just want to be sure what our target is here.
>
> MS. FORSHEIT: Absolutely. The initial 60-day reception center; *and then when they are transferred to another prison, the same process is underway. And Mr. Johnson has been transferred, I believe, at least two or three times. At each stage of the process he has been classified according to race.*

Excerpts from Transcription of Audiotape of Hearing before the United States Court of Appeals for the Ninth Circuit held on October 10, 2002, Addendum, 1a-2a, *infra* (emphasis added).[5]

5. Respondents' further argument (at 10 & n.7) that they actually complete the classification of transferred inmates already in the system within 14, not 60, days, invoking section 62010.8.3 of the CDC's Departmental Operations Manual ("DOM"), is both unsupported in the record and beside the point. The policy expressly permits segregation for up to 60 days and the inmates are actually segregated for a prolonged time. J.A. 245a.

Section 62010.8.3 of the DOM, on which Respondents rely (at 10 n.7), says only that "[e]ach institution shall establish an initial classification committee to review and initiate a suitable program for each inmate within 14 days after arrival at the institution[,]" not that the inmate will be classified and placed within that fourteen day period. As is made clear by the remainder of section 62010.8.3, the committee is only charged with the following:

> initiat[ing] an educational, vocational training, or work program and privilege group designation[; e]valuat[ing]

(Cont'd)

II. This Court Should Not Craft A Prison Exception To Its Longstanding Race Jurisprudence Holding That All Racial Classifications Must Be Subject To Strict Scrutiny

Strict scrutiny is required here by the Court's frequent, recent, and carefully considered holdings that "*all* racial classifications imposed by government 'must be analyzed by a reviewing court under strict scrutiny'" (*see* Pet. Br. 15 (quoting *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003)), a standard that contrasts sharply with the standard of *Turner v. Safley*, 482 U.S. 78 (1987), which even the Respondents concede has not been applied to all constitutional claims (*e.g.*, not to those bottomed on the Eighth or Fifth Amendments).[6] Strict scrutiny is required as well by *Lee v. Washington*, 390 U.S. 333, 334 (1968), part of the post-*Brown v. Board of Education*, 347 U.S. 483 (1954), line of cases that the Court and commentators have overwhelmingly understood as requiring strict scrutiny (despite the absence of those words).[7] Moreover, if there were any doubt,

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> case factors and assist[ing] the inmate to understand institution expectations, available programs, and resources[; d]esignat[ing] the degree of custody necessary to control the inmate[; r]eferr[ing] complex cases to the ICC[; r]ecommend[ing] transfer of a new arrival determined to be inappropriately placed[; and g]rant[ing] worktime credits to which the inmate is entitled while in transit.

None of the CDC's declarants stated that transferred inmates are actually classified within 14 days of arrival at the new institution, or housed in accordance with any such prompt classifications, and Johnson was not.

6. Resp. Br. 22-23; *see also, e.g.*, Pet. Br. 29-30, U.S. Br. 15-16, and ACLU Br. 17-21.

7. *See, e.g.*, *Miller v. Johnson*, 515 U.S. 900, 911 (1995) (citing post-*Brown per curiam* decisions for the proposition that "the State may not, absent extraordinary justification, segregate citizens on the basis of race"); Christopher E. Smith, *Courts and the Poor* 85 (1991)

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the *Lee* Court eliminated it by its holding that "[r]acial segregation, which is unconstitutional outside prisons, is unconstitutional within prisons, save for the *necessities* of prison security and discipline." *See* Pet. Br. 20 (quoting *Cruz v. Beto*, 405 U.S. 319, 321 (1972)). A standard that bars discrimination save for "the necessities of prison security and discipline" evokes strict scrutiny, not *Turner*. Permitting discrimination only where shown to be "necessary" is precisely what strict scrutiny entails, *see Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995) (race-based action will survive strict scrutiny only if shown "necessary to further a compelling interest"), and is far more exacting than *Turner*, which is a test looking merely to rationality, not demonstrated necessity. *See, e.g., Overton v. Bazzetta*, 539 U.S. 126, 131-32 (2003); *McKune v. Lile*, 536 U.S. 24, 37 (2002); *Washington v. Harper*, 494 U.S. 210, 226 (1990); *Turner*, 482 U.S. at 89.

It makes no difference that the Court's short *per curiam* opinion in *Lee* did not label its standard of review "strict scrutiny"; the same is true of *Brown*, 347 U.S. 483, itself, and of such subsequent cases as *New Orleans City Park Improvement Association v. Detiege*, 358 U.S. 54 (1958) (*per curiam*), *Gayle v. Browder*, 352 U.S. 903 (1956) (*per curiam*), *Holmes v. Atlanta*, 350 U.S. 879 (1955) (*per curiam*), and *Mayor and City Council of Baltimore v. Dawson*, 350 U.S. 877 (1955) (*per curiam*), all of which have long been understood as having applied and required strict scrutiny. *See Miller*, 515 U.S. at 911 (citing cases). Having held strict scrutiny applicable to race classifications long before *Lee*, and having voiced no intent to alter the standard of review first articulated in *Korematsu v. United States*, 323 U.S. 214 (1944), it follows that the Court applied nothing less to the

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("The Supreme Court applied strict scrutiny to discriminatory racial classifications after *Brown v. Board of Education*. . . ."); Thomas W. Simon, *Suspect Class Democracy: A Social Theory*, 45 U. Miami L. Rev. 107, 125 (1990) (application of strict scrutiny "finally culminat[ed] in *Brown v. Board of Education*").

racial segregation of prison inmates when the Court decided *Lee*. This understanding is manifest in the published decisions of numerous courts applying *Lee* accordingly. *See, e.g., Sockwell v. Phelps*, 20 F.3d 187, 191 (5th Cir. 1994); *Black v. Lane*, 824 F.2d 561, 562 (7th Cir. 1987); *Mason v. Schriro*, 45 F. Supp. 2d 709, 714 (W.D. Mo. 1999); *Betts v. McCaughtry*, 827 F. Supp. 1400, 1404 (W.D. Wis. 1993).

The Court's usual deference to prison authorities does nothing to buttress the CDC's request for extraordinary deference to its use of racial classifications. This Court has demonstrated emphatically that the deference traditionally paid to coordinate branches of government gives way when racial classifications are involved (*Adarand*, 515 U.S. at 227-31), precisely because the wide governmental power conferred (or recognized) by the Constitution generally excludes the power to govern through racially discriminatory laws. The "inherently suspect" nature of racial classifications is understood to trigger "the most exacting judicial examination," regardless of the beneficence or gravity of its purported purpose. *Miller*, 515 U.S. at 904 (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 291 (1978) (opinion of Powell, J.)).

The Court has required such scrutiny because racial classifications are "more likely to reflect racial prejudice than legitimate public concerns; the race, not the person, dictates the category." *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984). Having concluded that racial classification is offensive to individual dignity and that "racial discrimination is by definition invidious discrimination," *Fullilove v. Klutznick*, 448 U.S. 448, 526 (1980) (Stewart J., joined by Rehnquist, J., dissenting), the Court has explicitly required since *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), that *every* governmental apportionment of burden, benefit, or regulation using race is permissible, if at all, only if the government can carry its heavy burden of demonstrating

that the use is necessary and narrowly tailored to achieve compelling governmental objectives. *Grutter*, 539 U.S. at 327.[8]

The CDC attempts to avoid strict scrutiny by asserting that the harms that arise from its racial classification and segregation fall equally on inmates of all races.[9] Resp. Br. 16. That approach

8. Amicus curiae the State of Utah, joined by seven other states (the "State Amici"), attempt to distinguish this case from recent racial equal protection cases focused on affirmative action on the ground that California's purpose here is assertedly "benign" or serves a legitimate interest. State Amici Br. 14-15. But while California's ultimate goal may be the benign and legitimate one of preventing violence, that purpose is no more "benign" or legitimate than were the goals of California in *Bakke* and Michigan in *Grutter* and *Gratz v. Bollinger*, 539 U.S. 244 (2003) – in all of which strict scrutiny was applied. In any event, it is long settled that the threat of racial violence cannot justify racial discrimination. *Cooper v. Aaron*, 358 U.S. 1 (1958); *Buchanan v. Warley*, 245 U.S. 60 (1917).

9. Mischaracterizing its practice as a fully protective undertaking not only wrongly deprives Johnson of the benefit of the inference that the intentional racial segregation was in fact invidious, but also disregards the further harm that Johnson has alleged, *i.e.*, that the CDC's segregation exacerbates and breeds racial animosity and tension and contributes to riots to which he is vulnerable. J.A. 164a-166a. Johnson's allegations echo the recognition of a California court that the CDC's racial segregation of inmates fosters a dangerous "'*culture of separation.*'" M.S. Enkoji, *Judge: Race-based lockdowns are illegal*, The Sacramento Bee, Dec. 21, 2002, at A1 (emphasis added). Hence, in late 2002, a Superior Court judge ordered the CDC to cease lockdown assignments based on race at Pelican Bay State Prison, agreeing that the practice could not be justified two years after the riot that precipitated the action, and that such determinations had to be made with respect to "the inmate's own past behavior, not on an assumption that he is aligned with a gang and prone to violence because of his race. . . ." *Id.*

That all other aspects of prison life outside of reception center housing may not be officially segregated fails to alter the reality that inmates are racially segregated most of the time they are in the reception centers, the gateway to the larger prison system. Prisons in California remain racially segregated in spite of *Lee*. *See* Human Rights Watch,

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was rejected when *Plessy v. Ferguson*, 163 U.S. 537 (1896), was overruled, and has been repeatedly rejected subsequently. Pet. Br. 19. "[I]t is beyond any serious dispute that [the distinction between government classifications that specifically favor or harm a group and those that apply equally] is utterly bereft of force in the post-*Croson*, post-*Adarand* world – where our focus is on the use of classifications *per se*. . . ." *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., No. 1*, 377 F.3d 949, 980 n.40 (9th Cir. 2004) (O'Scannlain, J., for the court). Racial classifications, no matter how equally applied, risk "breed[ing] deep seated cross-racial resentment and do violence to the constitutional principle that 'we are one race here. It is American.'" *Id.*, 977 F.3d at 987 (quoting *Adarand*, 515 U.S. at 239 (Scalia, J., concurring)). The Court therefore strictly scrutinizes all racial classifications because "[r]ace-based assignments 'embody stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts – their very worth as citizens – according to a criterion barred to the Government by history and the Constitution.'" *Miller*, 515 U.S. at 912 (quoting *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 604 (1990) (O'Connor, J., dissenting) (citation omitted)).

The rule challenged here violates the "central mandate [of the Equal Protection Clause, namely] racial neutrality in governmental decisionmaking." *Miller*, 515 U.S. at 904. Government use of race is inherently suspect, regardless of asserted harms or benefits. For example, reiterating that "laws

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No Escape, Male Rape in U.S. Prisons, Chapter II, *available at* http://www.hrw.org/reports/2001/prison/report2.html ("A Supreme Court decision banned the practice in 1968, but nonetheless many penal facilities continue to separate inmates by race, sometimes relying on surrogate variables such as gang affiliation or following inmate preferences for self-segregation.") (citing Daniel B. Wood, *To Keep Peace, Prisons Allow Race to Rule*, Christian Science Monitor, Sept. 16, 1997 (describing how in California prisons "nearly every activity – sleep, exercise, and meals – is determined by race")).

that explicitly distinguish between individuals on racial grounds fall within the core of [the Equal Protection Clause's] prohibition[,]" the Court has invalidated legislative redistricting plans where race was the predominant factor in the districting determination. *Miller*, 515 U.S. at 905 (quoting *Shaw v. Reno*, 509 U.S. 630 (1993)) (alteration in original). Strict scrutiny was applied in both *Shaw* and *Miller* not because of any vote dilution or other differential harm, but because "the essence of the equal protection claim recognized … [was] that the State ha[d] used race as a basis for separating" citizens. *Miller*, 515 U.S. at 911 (discussing *Shaw*).

The *Lee* formulation of strict scrutiny, generated (unlike *Turner*) in full consideration of the prison context *and* the evils of racial segregation, properly applies to test the CDC's racial segregation policy. Racial segregation in prison is constitutionally prohibited unless prison authorities establish particularized circumstances in which "the necessities of prison security and discipline" require its use.

III. No "Particularized Circumstances" Demonstrate That Respondents' Segregation Policy Is Necessary For Prison Security And Discipline

Respondents did not prove that their practice of racially segregating prisoners in two-person cells is necessary to maintain prison security and discipline. *See Cruz*, 405 U.S. at 321 (citing *Lee*); *see also Lee*, 390 U.S. at 334 (Black, J., concurring) (use of race could be justified, if at all, only by "particularized circumstances" requiring that use of race to maintain security, discipline, and order).

Respondents' policy is not a response to anything in "particular"; to the contrary, it is applied to each and every incoming and transferred male inmate regardless of that inmate's "particularized circumstances." In 2003, that policy was uniformly applied more than 350,000 times. Resp. Br. 6 & n.3. As discussed in Section III.C., *infra*, Respondents' policy is not

even rationally related to the goal of averting racial violence given that, as often as not, gang violence is intraracial, or not shown to be the product of racial tension. Further, Respondents have not identified a single incident of racial violence arising in the cells.[10]

A. None of the Incidents of Racial Violence in California Prisons Identified by Respondents or the Ninth Circuit Resulted From *Intra*-Cell Violence

Not one of the violent incidents identified by Respondents in support of their Motion for Summary Judgment – all of which took place at Pelican Bay State Prison, where Johnson has never

10. Respondents' reliance on *White v. Morris*, 832 F. Supp. 1129 (S.D. Ohio 1993) (at 30), is greatly misplaced. In *White*, the court reluctantly agreed to modify a desegregation order *only* in response to a devastating riot that the court found presented "particularized and exigent circumstances." In fact, due to the riot, many of the inmate records, including security information, were destroyed. Accordingly, the *White* court felt it necessary to implement such emergency procedures to preserve security after the riot. *Id.* at 1131. It modified the desegregation order with a very strict instruction that the facility resume desegregated housing as soon as feasible. In ordering a limited policy of segregated celling, the *White* court took great pains to reject arguments relied upon by the prison officials in that case:

> [T]his Court is in no way approving of, or putting its imprimatur on, invidious, state-sanctioned, race-based, discrimination. The Court has, with great difficulty and reluctance, reached the above conclusions [to allow segregated housing for a temporary period], in light of the *particularized and exigent circumstances* of this case, and the applicable law as interpreted by the United States Supreme Court. A conclusion drawn from a reading of this Order to the effect that the Court in any way approves of, or considers at all acceptable, invidious discrimination, which has blemished this nation's otherwise proud history, has utterly missed the meaning, purpose, limitations and necessity of this Order.

Id. at 1137 (emphasis added).

been housed – stemmed from an incident within a cell. J.A. 296a-301a. Further, as explained in Johnson's Opening Brief, Pelican Bay State Prison is designed for the most notoriously violent convicts. Pet. Br. 5-6. The other incidents identified by the Ninth Circuit (Pet. App. 16-18a n.9, cited at Resp. Br. 4, 30) are based on press reports of riots at CDC facilities that *did not occur or begin in the cells*.[11] Nor did they occur in reception centers.

Moreover, Respondents' integration of the prison exercise yards (Resp. Br. 9 n.6) is entirely inconsistent with their defense of the segregated cells. As a CDC spokesperson has explained, "'We as a society are integrated. If these people are going back to society, they have to be able to live with other groups.'"

11. *See Racial fight erupts at prison*, San Diego Union-Tribune, Mar. 3, 2000, at A3 ("The fight stemmed from racial tension, *but it was unclear what specific act triggered the attack*, said a prison official.") (emphasis added); Sue Fox, *Lancaster Prison Locked Down After Riot Hurts 10*, Los Angeles Times, Aug. 9, 2000, at B2 ("A maximum-security area . . . at the California State Prison in Lancaster remains locked down as authorities try to learn the cause of a brawl there. . . . The violence erupted . . . in an *outdoor exercise yard* when large groups of Latino and white inmates 'rushed toward each other' and began fighting. . . .") (emphasis added); Jeff Barnard, *Racial fights an inescapable fact of prison life*, San Diego Union-Tribune, Feb. 26, 2000, at A3 ("When 200 inmates stepped out of their concrete cellblocks onto a grassy *exercise yard* at Pelican Bay State Prison this week, many came ready to fight. . . .") (emphasis added); Ben Goad, *Race riot hits Adelanto prison: More than 100 men are moved out of the private facility*, The Press-Enterprise, Mar. 3, 2000, at B1 ("Thursday's insubordination, sparked by Wednesday's fisticuffs, involved the refusal of dozens of inmates to leave the *dining area* of the facility. . . .") (emphasis added); *Riot in Calif. Prison, 1 Dead*, Los Angeles Times, Sept. 28, 1996, at A12 ("A fight between 100 black and Latino inmates in an *exercise yard* at Folsom state prison yesterday led to the death of one prisoner and injuries to 13 others.") (emphasis added). One of the incidents cited in the Ninth Circuit's opinion, relied upon by Respondents, occurred in a Los Angeles County jail not run by the CDC. *See 80 Inmates Hurt In Calif. Jail Brawl*, Newsday, Jan. 11, 1994, at 17.

Steve Gessinger, *Violence Mounts As Racial Gangs War in Prisons*, Los Angeles Sentinel, Mar. 25, 1998, at 1, cited at Pet. App. 16-18a n.9 (quoting Christine May, CDC spokesperson).

To the extent that there have been reports of interracial violence in those yards, it has been found due in large measure to guard misconduct. *See, e.g., Robinson v. Prunty*, 249 F.3d 862, 867 (9th Cir. 2001) (finding deliberate indifference claim sufficient based in part on allegations that California prison guards set up "gladiator-like" conflicts between inmates – already segregated from the rest of the prison for violating prison rules – of different races and who had known racial animosities); Gessinger, *supra* ("Fights happen, but it's worse now that a federal grand jury investigating another prison has accused guards of intentionally setting the prisoners up for gladiator-like fights – putting known enemies together in the yard.").

B. Respondents Have Sufficient Information to Safely House Both Transferred Prisoners and Even New Prisoners Within Reception Centers Without Resort to Race

Respondents maintain that they must make initial housing determinations with "only limited information" (Resp. Br. 6, 43). However, Respondents concede that more than 85 percent of the 350,000 male inmates received or transferred last year were racially segregated, *even though they had previously been housed by the CDC* (Resp. Br. 6) and had therefore already been evaluated, classified, and observed by the CDC in actual cell assignments. The incarceration records of those inmates certainly must have been available to permit the CDC to evaluate cell assignments without resort to race.[12]

12. The statements of the CDC's witnesses also directly contradict Respondents' assertions the CDC lacks any race-neutral indicia of gang affiliation. Linda Schulteis, the Associate Warden of California State Prison – Lancaster, who submitted one of the only two declarations on which Respondents rely, testified in deposition that gang members "will identify themselves by the way they cut their hair," by the clothes they wear, and even by the color of the pens they use. J.A. 184a.

With respect to the newly admitted inmates who comprise fewer than 15 percent of annual admissions, Respondents' claim that they receive only minimal information from county jails (Resp. Br. 6, 43 (citing Cal. Penal Code § 1216 (West 2004))) is contrary to the California Penal Code and Rules of Court. Following conviction but before sentencing to prison, a probation officer evaluates a defendant to produce a presentencing report that will follow the convict to the CDC. Indeed, Penal Code § 1203c *requires* a presentence report on every person sentenced to prison for use not only by judges, but "by the Department of Corrections in deciding upon the type of facility and program in which to place a defendant. . . ." Cal. Rules of Court, Criminal Cases, rule 4.411(d) (West 2004). A presentence investigation and report are called for by the California Rules of Court expressly to facilitate compliance with Penal Code § 1203c, which mandates:

> Notwithstanding any other provisions of law, whenever a person is committed to an institution under the jurisdiction of the Department of Corrections, whether probation has been applied for or not . . . *it shall be the duty of the probation officer of the county from which the person is committed to send to the Department of Corrections a report upon the circumstances surrounding the offense and the prior record and history of the defendant* as may be required by the Administrator of the Youth and Adult Corrections Agency. *These reports shall accompany the commitment papers*.

Cal. Penal Code § 1203c (West 2004) (emphasis added). *See also* J.A. 259a (Petitioner's Institutional Staff Recommendation Summary, including as sources probation officer's reports dated February 21, 1986, June 9, 1986, and March 24, 1987, prepared months before Petitioner's arrival at the CDC).

C. The High Probability of Intraracial Violence Between and Among Gang-Affiliated and Non-Gang-Affiliated Inmates Shows Respondents' Policy to Be Unwarranted and Indeed Perverse

Respondents argue that "[i]t is widely recognized that prison gangs are formed and organized along racial lines." Resp. Br. 4. But they made no showing whatsoever that most prison crime is interracial, that most interracial prison violence is the product of racial hostility, or that leading gangs are without antagonism to all members of the same race. *See* Alejandro A. Alonso, *African-American Street Gangs in Los Angeles*, National Alliance of Gang Invest. Ass'n (1998), *available at* http://www.nagia.org/Crips_and_Bloods.htm (cited at Resp. Br. 11 n.8) (noting conflict between Bloods and Crips). Even if Respondents had provided evidence of the rates of interracial prison violence, interracial violence is a necessary, but certainly not sufficient, premise from which to conclude that violent incidents are racially motivated.

Statistics show that, contrary to Respondents' blanket assertions, "most crime is intraracial. More than 80 percent of homicides where we know the race of the killer are either white-on-white or black-on-black. Research among Vietnamese and Chinese in California has also shown that most crime there is intraracial." Christopher Stone, *Race, Crime, and the Administration of Justice*, Nat'l Inst. Justice J., Apr. 1999, at 26-32. "From 1976-2000, according to [the Bureau of Justice Statistics], '86 percent of white victims were killed by whites; 94 percent of black victims were killed by blacks.'" Frank J. Murray, *Murder hits 40-year low*, Washington Times, Oct. 5, 2003, at A1, *available at* 2003 WL 7720408. *See also* Department of Justice, Federal Bureau of Investigation, Uniform Crime Reports, *Crime in the United States, 1995*, Section II, at 14 ("Murder is most frequently intraracial among victims and offenders. In 1995, data based on incidents involving one victim and one offender showed that 94 percent of the black

murder victims were slain by black offenders, and 84 percent of the white murder victims were killed by white offenders."); *Banning Racial Profiling: Hearing on S. 989 Before the Senate Subcomm. on the Constitution, Federalism, and Property Rights*, 107th Cong. 24-77 (2001) (statement of Steve Young, National Vice President Fraternal Order of Police) ("Most violent crime is intraracial – more than 80 percent of homicides where we know the race of the killer are either white-on-white or black-on-black crimes.").

These statistics do not change when the homicides are gang-related. A study regarding gang-related homicides in Los Angeles County found that "[i]ntraracial homicides accounted for . . . 82.2% . . . in which the race of both the victim and perpetrator were known." H. Range Hutson, M.D., *et al.*, *The Epidemic of Gang-Related Homicides in Los Angeles County From 1979 Through 1994*, 274 JAMA 1031, 1033 (1995).

Counsel for Respondents admitted at oral argument before the Ninth Circuit that the CDC's policy does nothing to avoid – and may even facilitate – potential conflicts between inmates of the same race that are in rival gangs:

> THE COURT: But lots of times you will have persons of the same race, say African-American, that are in rival gangs.
>
> MS. TURNER: That's true.
>
> THE COURT: That would even be worse, wouldn't it?
>
> MS. TURNER: . . . [T]hat's absolutely true. Certainly the Hispanic gang – the Hispanic gang, if you were to say, maybe, the Mexican Mafia gang, you have northern and southern, but they're still, you know, two different factions of that gang. . . . And there can be conflicts.

See Addendum, 2a-3a, *infra*.

D. Respondents Admit They Have Never Considered Whether Ready Alternatives to Their Segregation Policy Exist

Even if the "particularized circumstances" establishing necessity were identical to the *Turner* standard's examination of whether there are ready, obvious alternatives to the challenged policy (Resp. Br. 26-27), Respondents' policy would nonetheless fail. That the Federal Bureau of Prisons and, evidently, all other 49 states manage to operate their prisons without California's express, intentional racial discrimination makes plain that Respondents could maintain prison safety with a host of ready, obvious alternatives. That California has not tried any such alternatives in any of its institutions, even on a trial basis – apparently for as long as 100 years (*see* Addendum, 3a, *infra*) – does not suggest that they do not exist, only that racial discrimination in the CDC is persistent and unexamined.

Respondents are surely correct that "[a]ll states have a compelling interest in maintaining the order and security of their prisons" (Resp. Br. 39), but not a single state other than California advances that interest with routine racial segregation. The Court is familiar with the solidarity of the states when it comes to supporting state policies threatened before this Court; if other states relied on the rule challenged here they would have said so. Even the United States, with a massive nationwide prison system to operate, has weighed in against Respondents for violating their obligations under the Equal Protection Clause.

The lack of foundation for Respondents' position is apparent in their statement that "[i]t only makes sense . . . to assume that if one or both of the occupants of a two-man cell *is* a member of a race-based gang, which is generally not known at that point, the cellmates will be likely to engage in cross-racial violence." Resp. Br. 42 (emphasis in original). As demonstrated in Johnson's Opening Brief and above, there is nothing in the record to support Respondents' multiple assumptions that all or most incoming prisoners are members of race-based gangs,[13] that all or most incoming prisoners will engage in interracial violence, regardless of gang affiliation, or that most violence in prison is interracial, rather than intraracial.

Without the slightest evidence that their blanket segregation policy is narrowly tailored to meet their interest in preserving prison security, Respondents instead argue that, should the Court subject their policy to strict scrutiny, they are entitled to a "do-over" on remand (Resp. Br. 37-38). But the Ninth Circuit's first decision, its reversal of the district court's original dismissal in March 2000, left an equal protection claim to litigate, expressly bottomed on *Lee* and *Cruz* and their reference to presumptive unconstitutionality unless justified by "'the *necessities* of prison security and discipline.'" *Cruz*, 405 U.S. at 321 (quoting *Lee*, 390 U.S. at 334) (emphasis added).

Respondents had a full and fair opportunity to present all information on which they wanted to rely (almost all of which was and is in Respondents' possession). Contrary to Respondents' suggestion (Resp. Br. 12-13), nothing in the Ninth Circuit's original decision (207 F.3d 650, J.A. 158a-168a) misled the state concerning the standard of review, much less provided any assurance that the relaxed *Turner* standard would apply; and Respondents' motion for summary judgment presumably compelled the Attorney General to collect the existing evidence on which the Respondents could rely in seeking to uphold the policy against an equal protection attack. Indeed, the Ninth Circuit's decision put Respondents on plain notice that strict scrutiny would (or might well) apply by holding that "'racial segregation, which is unconstitutional outside prisons, is unconstitutional within prisons, save for 'the necessities of

13. In fact, the statistics relied upon by State Amici indicate that the gang members are a minority among state inmates. *See* State Amici Brief at 17, citing National Gang Crime Research Center, *Gang Resources* 1, *at* http://www.ncjrs.org/gangs/summary.html (in 1999, state correctional facilities believed that fewer than 25 percent of adult state prison inmates were gang members).

prison security and discipline.'" J.A. 164a (quoting *Cruz*, 405 U.S. at 321 (quoting *Lee*, 390 U.S. at 334)). The "necessities" standard necessarily suggests strict scrutiny, not rational relationship. *See, e.g., Grutter*, 539 U.S. at 327 ("When race-based action is necessary to further a compelling governmental interest, such action does not violate the constitutional guarantee of equal protection so long as the narrow-tailoring requirement is also satisfied.").

Respondents were free to defend their unique practice with whatever facts, studies, or witnesses might have supported it.[14] The fact is that no such support exists. Respondents are not entitled to a second chance to attempt to defend – and thereby prolong – their constitutionally defective housing practices.

CONCLUSION

The issue of qualified immunity is not before this Court. For all of the foregoing reasons, and those set forth in his Opening Brief, Johnson respectfully requests that this Court reverse the opinion below and find that California's practice of routine racial segregation of incoming and transferred state prisoners violates the Equal Protection Clause.

14 The CDC identified Warden Schulteis and Former CDC Director Cambra as the persons most knowledgeable about its policies and practices, pursuant to Fed. R. Civ. Pro. 30(b)(6). Presumably no one could have presented better evidence than they did.

Respectfully submitted,

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ADDENDUM — EXCERPTS FROM TRANSCRIPTION OF AUDIOTAPE OF HEARING HELD ON OCTOBER 10, 2002 3:20-4:18; 13:15-14:4; 15:22-16:11

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Ninth Circuit No. 01-56436
D.C. No. CV 95-1192-CBM

GARRISON S. JOHNSON,

Appellant,

v.

JAMES H. GOMEZ and JAMES ROWLAND,

Appellees.

Hearing held on October 10, 2002

Before Ninth Circuit Judges:
O'Scannlain, Hug, and Brunetti

Counsel for Appellant: Tanya L. Forsheit
Proskauer Rose LLP

Counsel for Respondents: Sara E. Turner
Office of the Attorney General

* * *

THE COURT: All right. But you are not arguing that there is a permanent segregation, that after 60 days, no matter what, they would still be segregated into two-person cells, are you?

MS. FORSHEIT: After 60 days, after the classification process, they are evaluated on a number of criteria, including psychological evaluation, custody level; and at that point they try

to place the inmate with someone with whom they believe they are compatible. And the inmate may also request placement with a particular inmate. However, at the –

THE COURT: But you are not arguing racial discrimination after the 60-day classification.

MS. FORSHEIT: That's correct.

THE COURT: All right.

MS. FORSHEIT: The initial 60-day –

THE COURT: Okay. I just want to be sure what our target is here.

MS. FORSHEIT: Absolutely. The initial 60-day reception center; and then when they are transferred to another prison, the same process is underway. And Mr. Johnson has been transferred, I believe, at least two or three times. At each stage of the process he has been classified according to race.

* * *

THE COURT: But lots of times you will have persons of the same race, say African-American, that are in rival gangs.

MS. TURNER: That's true.

THE COURT: That would even be worse, wouldn't it?

MS. TURNER: Well, I mean, if the inmates say that they really can't cell together, then they won't cell them together. But that's absolutely true. Certainly the Hispanic gang — the Hispanic gang, if you were to say, maybe, the Mexican Mafia gang, you have northern and southern, but they're still, you know, two different factions of that gang, but they are still

of the same race. And there can be conflicts. And Pelican Bay points it out; that was a big conflict at Pelican Bay, an ongoing one.

* * *

THE COURT: I understand that. So is that an alternative determination? In other words, when they came down with the single cell –

MS. TURNER: Double.

THE COURT: — or two inmates per cell and single race, that was the only alternative in a determination of what was possible?

MS. TURNER: Well, you know, I don't know. Because, as I said, it has been over 25 years. We don't even know when it began. I don't know when it came about. Perhaps when double-cell –

THE COURT: Do we have to look at that issue?

MS. TURNER: Well, it was perhaps when double-celling was first instituted, somebody — it could have been a hundred years ago.

* * * *